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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 33

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

versus

BENNO BARTELS, RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

L. M. BICKETT,
San Antonio, Texas,
JOHN H. BICKETT, JR.,
Dallas, Texas,
Counsel for Petitioner.

BYRON K. ELLIOTT,
Boston, Massachusetts,
Of Counsel.

LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

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BRIEF FOR PETITIONER.

To the Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

OPINIONS OF THE CIRCUIT COURT OF APPEALS.

The majority and dissenting opinions of the Circuit Court of Appeals for the Fifth Circuit in this case are reported in 100 F. (2d) 813-819. And those opinions are, also, shown in the Transcript of the Record in this case before this Court. (R. 118-124; 133-138).

GROUNDS OF JURISDICTION.

Petitioner presents the following grounds as the basis upon which it is contended that the Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals in this case:

1. The majority opinion and decision of the Circuit Court of Appeals in this case reflects a most unusual division of opinion and conflict among four judges of the Circuit Court of Appeals for the Fifth Circuit, as shown in the majority and dissenting opinions in this case and in other similar cases decided by that court at about the same time, namely: *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, *In re John Beverly Henderson*, 100 F. (2d) 280, *Wilson, Administrator*, v. *Alliance Life Insurance Company*, decided on March 16, 1939, not yet officially reported (Appendices "D" and "E" of this brief); and such division of opinion and conflict within the Circuit Court of Appeals for the Fifth Circuit calls for an exercise of the Supreme Court's power of supervision.

2. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, 112 A. L. R. 1455.

3. The majority opinion and decision of the Circuit Court of Appeals in this case is in direct conflict with the decisions of other Circuit Courts of Appeal, upon the same questions involved in this case, in the following cases, among others, namely:

In re Borgelt (Seventh Circuit), 79 F. (2d) 929.

Helbstab v. Equitable Life Assur. Soc. (Tenth Circuit), 91 F. (2d) 655, 659.

Pearce v. *Coller* (Third Circuit), 92 F. (2d) 237 (certiorari denied).

In re Coleman (Sixth Circuit), 93 F. (2d) 1001, C. C. A. (1938).

Massey v. *Farmers & Merchants Bank* (Fourth Circuit), 94 F. (2d) 526 (1938).

4. The majority opinion and decision of the Circuit Court of Appeals in this case has misconstrued and misapplied a Federal statute, to-wit: Section 75 (s) of the Bankruptcy Act as amended (11 U. S. C. A., Sec. 203 [s]).

5. The petitioner, by the construction and application given by the majority opinion and decision of the Circuit Court of Appeals in this case to Section 75 (s) of the Bankruptcy Act, as amended, has been deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals, by the majority opinion and decision in this case, has erroneously failed to give effect to fact findings of the District Court, which are not questioned, criticized, or rejected by the Circuit Court of Appeals, and which are amply supported by evidence in the record.

STATEMENT OF THE CASE.

This case concerns the proper construction and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), relating to agricultural compositions and extensions. (Appendix "A" of this brief).

Upon the motion of petitioner, John Hancock Mutual Life Insurance Company, a lien creditor, the District Court

dismissed the petition for composition and extension of Benno Bartels, the debtor. As a basis for the decree or order of dismissal, the District Court, after a full hearing, found: (1) that the debtor had no equity in his farm, which constituted the principal asset of his estate, and upon which the lien creditor held a mortgage; (2) that the debtor offered no definite or feasible plan for a composition and extension of his debts; (3) that there was no reasonable hope of the debtor's financial rehabilitation out of the property involved in the estate; and (4) that the debtor's petition was not filed in good faith in a bona fide attempt to effect a composition and extension of his debts. (R. 106-109).

On the debtor's appeal from the order of the District Court dismissing the petition and all proceedings thereunder, the Circuit Court of Appeals for the Fifth Circuit, by a divided court, reversed the judgment and decree of the District Court. (R. 124).

The majority opinion of the Circuit Court of Appeals in this case, written by Circuit Judge Sibley and concurred in by Circuit Judge Hutcheson (R. 118-123), while not questioning the fact findings of the District Court, nevertheless, holds that the District Court was without the power to dismiss the debtor's petition and proceedings thereunder. In a dissenting opinion in this case (R. 123-124), Circuit Judge Holmes, expressing the view that the judgment and decree of the District Court should be affirmed, said in part:

> "In sustaining the constitutionality of the act, the Supreme Court held that the proceeding could be maintained only as a *bona fide* effort on the part of the debtor to rehabilitate himself, and that this was without regard to any provision of the act specifically requiring good faith. In a footnote to its opinion, it says: 'Relief under Sec. 75 (S) may be obtained only by one who has made a *bona fide* at-

tempt, and has failed, to effect a composition under Sec. 75 (a) (r).' *Wright* v. *Vinton Branch*, 300 U. S. 440, 462. It further states that the proceedings will be halted at the outset if the debtor is beyond hope of rehabilitation. Such a pronouncement, when made the basis of a holding that an enforced delay in favor of one class of litigants for a period of three years does not violate the due-process clause of the Constitution, should not be disregarded."

* * * * * * * * *

"The decision of this case is unfortunate in view of our decision in *John Beverly Henderson, Debtor*, No. 8758, (100 F. [2d] 820), this day decided. The two cases were submitted at the same term of court and were considered together; but, owing to the fact that exactly the same judges did not sit in both cases, a different result is reached."

Thereafter, on petition for rehearing filed in the Circuit Court of Appeals, the majority of the court, composed of Circuit Judges Sibley and Hutcheson, adhered to its original opinion and denied a rehearing. And, upon the petition for rehearing, Circuit Judge Holmes, in a second dissenting opinion (R. 133-138), said in part:

"Recurring to the real question at issue, the majority opinion says that Section 75 nowhere mentions initial good faith as a prerequisite to invoking subsection (s). As to this, the note to *Wright* v. *Vinton Branch*, 300 U. S. at page 462, seems to me to be ample authority. It elaborates upon the construction of the act in the body of the opinion. Apparently the note has the full sanction of the court, and, in addition to what I have previously quoted, it says: 'It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition in the outset.' That is, he could not have filed his original petition, amended under subsection (s)."

On the same day on which the Circuit Court of Appeals for the Fifth Circuit, by the majority opinion, reversed this case and held that the District Court was in error in dismissing the debtor's petition and all proceedings thereunder, the same court, in an opinion by Circuit Judge Holmes, concurred in by Circuit Judge McCord, then constituting the majority of the court, reached a different result and rendered a contrary opinion in the case of *John Beverly Henderson, Debtor,* (100 F. [2d] 820). In the *John Beverly Henderson* case, Circuit Judge Hutcheson dissented for the reasons given in the majority opinion in the *Bartels* case that day decided. Copies of the majority and dissenting opinions in the *John Beverly Henderson* case are appended to this brief. (Appendices "B" and "C" of this brief). Thus, owing to the fact that exactly the same judges did not sit in this, the *Bartels* case, and in the *Henderson* case, both of which were decided by the Circuit Court of Appeals for the Fifth Circuit on the same day, different results and judgments were reached in the two cases.

Thereafter, on March 16, 1939, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Wilson, Administrator,* v. *Alliance Life Insurance Company,* (not yet officially reported), (Appendices "D" and "E" of this brief), before Circuit Judges Sibley, Holmes, and McCord, in an opinion by Circuit Judge Holmes, then of the majority, affirmed the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder. And, in that case, Circuit Judge Sibley, who had theretofore been of the majority in this, the *Bartels* case, wrote a minority opinion adhering to the views originally expressed by him in this, the *Bartels* case. In *Wilson, Administrator,* v. *Alliance Life Insurance Company, supra,* Circuit Judge Holmes, speaking for the majority, said, in part:

"Accepting the finding that the order was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of composition and extension under Section 75 of the act (11 U. S. C. A. 203 [a]-[r] are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 [s]). *Baxter* v. *Savings Bank of Utica*, *supra*, 92 F. (2d) 404, 406; *In re John Beverly Henderson*, 100 F. (2d) 820."

Thus, the Supreme Court is asked, in this, the *Bartels* case, to review a judgment and decree of the Circuit Court of Appeals for the Fifth Circuit, rendered by a divided court, in direct conflict with a decision, also, by a divided court, in a similar case decided by the same court on the same day (*In re John Beverly Henderson*, 100 F. [2d] 820), and, likewise, in direct conflict with a decision of the same court, rendered shortly thereafter in a similar case (*Wilson, Administrator,* v. *Alliance Life Insurance Company*, Appendices "D" and "E" of this brief), where the conflicts in each of the three similar cases, as pointedly stated in the majority and dissenting opinions, arise upon the interpretation, construction, and application of Subsection (s) of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Section 203 (s), as previously construed and interpreted by the Supreme Court of the United States in *Wright* v.

Vinton Branch Bank, 300 U. S. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, 112 A. L. R. 1455. The conflicts are irreconcilable. In this, the *Bartels* case, the decision of the majority, *as then constituted*, is not in accord with the decision of the Supreme Court in *Wright* v. *Vinton Bank* (*supra*); in each of the two cases, of *John Beverly Henderson*, and *Wilson, Administrator*, v. *Alliance Life Insurance Company*, *supra*, the decision of the majority, *as then constituted*, is in accord with the decision of the Supreme Court of the United States in *Wright* v. *Vinton Bank*, *supra*.

The petitioner represents that the principal question involved in this case is as follows:

Where, under the accepted findings of the District Court, the debtor had no equity in his farm, the debtor offered no feasible plan of composition and extension, there was no hope of the debtor's financial rehabilitation, and the debtor's petition was not filed in good faith, was the District Court authorized to dismiss the debtor's petition and proceedings under Subsection (s), of Section 75 of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (s)?

SPECIFICATION OF ASSIGNED ERRORS.

Petitioner specifies and urges in this Court the following assigned errors, all of which were presented as grounds in petitioner's motion for rehearing filed in the Circuit Court of Appeals and overruled by that Court, namely:

FIRST.

The decision and judgment of the Circuit Court of Appeals in this case, whereby the judgment of the District Court, dismissing the debtor's petition and all proceedings thereunder, was reversed and the case was ordered reinstated for further proceedings, is erroneous, because such

decision and judgment is in direct conflict with the holding of the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736, 743, 112 A. L. R. 1455, wherein the Supreme Court has distinctly held: (1) that "Relief under Section 75 (s) (Bankruptcy Act as amended, 11 U. S. C. A., Sec. 203 [s]), may be obtained only by one who has made a *bona fide* attempt, and has failed, to effect a composition under Section 75 (a)-(r) (Bankruptcy Act as amended)"; (2) that a debtor's proceeding under Section 75 of the Bankruptcy Act "will be halted at the outset" if the debtor is beyond all reasonable hope of financial rehabilitation; and (3) that, without regard to any provision of the Act (Section 75 of the Bankruptcy Act, 11 U. S. C. A.), or any specific requirement that the debtor's petition be made in good faith, nevertheless, good faith on the part of the petitioning debtor is required. (First Ground of Motion for Rehearing, R. 126).

SECOND.

The Circuit Court of Appeals erred in its decision and judgment in this case in overruling and rejecting the holding previously made by it in the case of *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404, in which case that court had said:

> "It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional effect of pro-

viding an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith." (Second Ground of Motion for Rehearing, R. 127).

THIRD.

The Circuit Court of Appeals erred in rendering its decision and judgment in this case, whereby the judgment of the District Court was reversed, because such decision is in direct conflict with the decision rendered by the same Court on the same day in the case of *John Beverly Henderson, Debtor,* (100 F. [2d] 820; Appendix "B" of this brief), in which case the majority follows and adheres to a previous decision of the same Court in the case of *Baxter* v. *Savings Bank of Utica,* 92 F. (2d) 402. (Third Ground of Motion for Rehearing, R. 128-129).

FOURTH.

The Circuit Court of Appeals erred in its decision and judgment reversing the judgment of the District Court, which dismissed the debtor's petition and proceedings thereunder, because the decision of a majority of that court has misconstrued and misapplied Section 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. Section 203 [s]), in that the court's construction, interpretation, and application of said statute is in conflict with a prior construction, interpretation, and application of said statute as made by the Supreme Court of the United States in the case of *Wright* v. *Vinton Branch Bank,* 300 U. S. 440, 462, 81 L.

Ed. 736, 743. (Fourth Ground of Motion for Rehearing, R. 129).

FIFTH.

The Circuit Court of Appeals erred in its decision, whereby the judgment of the District Court dismissing the debtor's petition and all proceedings thereunder was reversed, because that court thereby misconstrued, misinterpreted, and misapplied Section 75 (s) of the Bankruptcy Act as amended, (11 U. S. C. A. 203 [s]), so as to deny to petitioner, John Hancock Mutual Life Insurance Company, due process of law and to deprive it of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that petitioner will be postponed and delayed, to its detriment and loss, in the enforcement of its debt and lien where, according to the unrejected findings of the trial court, the debtor had no equity in his farm, the debtor's petition was not filed in good faith in a bona fide effort to obtain a composition and extension of his debts, and there was no reasonable hope of the debtor's financial rehabilitation. (Fifth Ground of Motion for Rehearing, R. 129-130).

SIXTH.

The Circuit Court of Appeals erred in reversing this case, because the District Court found that the debtor had no equity in the farm, that his petition was not filed in good faith, and that there was no reasonable hope of his financial rehabilitation, and those findings are not questioned, criticised, or rejected, by reason whereof that court has erroneously failed to give effect to the fact findings of the District Court which are amply supported by evidence in the record. (Sixth Ground of Motion for Rehearing, R. 130).

ARGUMENT.

The order or judgment of the District Court in this case is shown at page 98 of the printed transcript of the record. That order sets aside a previous order which adjudicated the debtor, Benno Bartels, a bankrupt under Section 75, subsection (s). And the order, also, dismisses the debtor's petition for composition or extension and all proceedings thereunder. The petitioner, John Hancock Mutual Life Insurance Company, submits that the order made by the District Court is amply supported by the record. The record shows and the District Court has found: (1) That there was no substantial equity or value over and above the lien indebtedness of petitioner, John Hancock Mutual Life Insurance Company, in the one hundred acre farm owned by the debtor, Benno Bartels; (2) that the debtor, Benno Bartels, had not submitted and could not submit to his creditors, (particularly, to the creditor John Hancock Mutual Life Insurance Company), any definite or feasible proposal for a composition or extension; and (3) that the financial condition of the debtor generally was such that there was no reasonable probability of his rehabilitation. (R. 99-108). The findings of the District Court, made the basis for the decree of dismissal, are not questioned in either the majority opinion or in the two dissenting opinions in this case.

The Debtor Had No Equity in His Farm.

The District Court, in findings which appear in the transcript of the record, said:

> "The Court fully realizes that it ought not to apply emergency prices to a matter of this kind or foreclose the possibility of rehabilitation on the theory that immediate liquidation could not be had. However, there is nothing here to indicate to the

Court that there is any reasonable probability of this property being sold for enough to give any substantial equity at all to the debtor. The charges are mounting rapidly and any equity that may exist will be wiped out." (R. 107).

The farm owned by the debtor, Bartels, on which John Hancock Mutual Life Insurance Company held a first and superior lien, contained one hundred acres of land situated in Guadalupe County, Texas, with improvements thereon. The lien indebtedness calculated up to March 23, 1938, amounted to $8,195.37. (R. 8-9). For the purpose of making a loan on the land, the Federal Land Bank fixed the loan value at $54.00 per acre, and the sum of $5,400.00 was the highest amount that the Federal Land Bank would lend on the land. (R. 29). A disinterested witness, Wm. F. Schutz, a real estate man who has dealt extensively in farms and real estate, testified: that the debtor's farm land was worth $40.00 per acre, and the improvements were worth $2,000.00, making a total valuation of $6,000.00—an amount considerably less than the existing lien debt held by John Hancock Mutual Life Insurance Company. (R. 94).

The record, further, shows that from fifteen to twenty-five acres of the debtor's farm are subject to overflow from a creek or "draw." The total amount of the cultivated land on the place was 85 acres. (R. 30).

It was shown that, within the last three or four years, the debtor has realized, as revenue from the farm, about $300.00 or $400.00 a year, whereas, annual interest alone on the lien debt amounted to $390.00. (R. 8-24).

The Debtor Offered No Definite or Feasible Proposal For a Composition or Extension.

The District Court found that the debtor, Bartels, had no definite plan or proposal to make to his creditors for a composition and extension of his debts; and, in that connection, the court quoted the following questions and answers from the record:

> "Q. Do you have any plan or proposal to submit to your creditors, Mr. Bartels, as a composition or extension of your debts in these proceedings?
>
> "A. No. I want to pay everybody that I owe, sure.
>
> "Q. You don't have any definite, concrete plan now, do you?
>
> "A. No, not exactly, but I want to pay everybody I owe.
>
> "Q. How are you going to raise the money to farm the land this coming year? Can you tell us how you are going to raise the money to farm it?
>
> "A. I will just have to get out and make a little." (R. 102).

It has been held repeatedly that the submission of some feasible plan or proposal for composition or extension is an absolute prerequisite for the debtor to proceed under Subsection (s) and to obtain the three year stay provided for by the Act. The authorities are clear to the point that some feasible and equitable plan or proposal must be made by the debtor to his creditors before the debtor is entitled to proceed under Subsection (s). For example, in the case of *In re Hilliker*, 9 F. Sup. 948, opinion by District Judge James, Southern District of California, the debtor's petition for composition and extension had been filed; and, thereafter, the debtor amended his petition under Subsection (s). In that case the court said:

"I am not intending in this case to hold that the petition as first filed before the Conciliation Commissioner was accompanied with bad faith sufficient to justify an order of dismissal on that ground. It is plain to me, however, that where a person initiates a petition before a Conciliation Commissioner and without submitting in good faith an offer of composition to his creditors but amends his petition under Sub-section (s), his proceeding must be forthwith dismissed. Because it is only after such an offer has been made and rejected by the creditors that he is authorized to amend under Sub-section (s). In a proper case, where an offer is submitted of a kind which shows that it is only done to perfunctorily satisfy the conditions of the Act, with no expectation that the creditors can, in justice to themselves, give any consideration to it, it will be the duty of the court to refuse to allow the proceeding to be maintained under the further provisions of Sub-section (s)."

See, also, *In re Ballard*, 10 F. Sup. 549, Southern District of New York.

A plan must be actually proposed as a prerequisite for the filing of an amended petition under Sub-section (s). See *In re Vater*, 14 F. Sup. 633, Eastern District of Kentucky.

Moreover, the proposal must be made in good faith. In this connection, the District Court, in its findings, said:

"One of the authorities, speaking with regard to the right of a farmer to advance under subsection (s), says this:

'The Courts have, however, qualified the right of the farmer to advance into (s) merely upon the rejection of a proposal. Perfunctory compliance with the prior subsections is not sufficient to authorize proceedings in (s).' In re Schaeffer, 14 F.

Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948. 'The farmer-debtor must first have submitted in good faith a valid proposal for the composition and/or extension of his indebtedness, and his failure so to do may be urged by the creditors when the debtor undertakes to amend his petition under (s).' Steverson v. Clark, 86 F. (2d) 330; In re Schaeffer, 14 F. Supp. 807; In re Borgelt, 79 F. (2d) 929; In re Hilliker, 9 F. Supp. 948; In re Vater, 14 F. Supp. 631.

'The requisites for a valid proposal have been expressed variously. In general, it seems clear that a proposal must be definite and unconditional.' In re Buxton's Estate, 14 F. Supp. 616. 'Composition or extension proposal by farmer-debtor that he would pay secured creditors as promptly as loans could be obtained from named bank held insufficient.' Citing In re Schaeffer, 14 F. Supp. 807.

'In re Borgelt, 79 F. (2d) 929 (C. C. A. 7th, 1935) (proposal contingent on loan from Federal Land Bank not valid). It must be feasible and reasonably calculated to effect a debt liquidation. Helbstab v. Equitable Life Assur. Soc. of U. S., 91 F. (2d) 655, 659 (C. C. A. 10th, 1937); In re Duvall, 14 F. Supp. 799 (W. D. Va. 1935); In re Wylie, 16 F. Supp. 193, 1934 (W. D. S. C. 1936); In re Schaeffer, supra; In re Borgelt, supra; In re Siske, C. C. H. 1936 Bankruptcy Law Serv. Sec. 3931 (M. D. N. C. 1936); see also note 6 to Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U. S. 440 (1937). It has been likewise held that the proposal must be equitable. In re Duvall, supra; In re Vater, supra; In re Schaeffer, supra. It must be submitted promptly. In re Schaeffer, supra; In re Borgelt, supra; In re Sterba, 74 F. (2d) 413 (C. C. A. 7th, 1935).'" (R. 100-101).

"Now, in the Baxter case, decided by the Circuit Court for the Fifth Circuit, to which I referred a moment ago, the Court there, speaking on the matter of good faith in the proposal, said:

'It has been pointed out that good faith in this connection means more than the absence of actual fraud. A bona fide effort to compromise with creditors is made a prerequisite to the relief afforded under subsection (s). * * * The primary purpose of Section 75 is the composition and extension of the debts of distressed farmers. The function of subsection (s) is to provide temporary relief to those who might be able to adjust their difficulties but have failed in the preliminary proceeding. Its presence in the Act has the additional effect of providing an inducement to secured creditors to accept a feasible plan when offered. Thus, its presence in the Act is in aid of the composition provisions, resort to which is made a prerequisite to the relief afforded. It may not be treated as an end in itself, with the other proceedings as mere procedural steps to be taken toward the relief there afforded. It follows that the offer of composition or extension was not made in good faith.' " (R. 101-102).

In *Wright* v. *Mountain Trust Bank*, 300 U. S. 440-470, 81 L. Ed. 736, the Supreme Court of the United States, in an opinion by Justice Brandeis, said, in speaking of the requirements of good faith and for the presentation by the debtor of some plan or proposal for composition or extension:

"This construction is in harmony with the requirement of good faith in the initiation of proceedings under Sec. 75. Relief under Sec. 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Sec. 75, (a)-(r). The offer of composition must be in good faith (March 3, 1933, Sec. 75, [c], [i], 47 Stat. at L. 1471, 1472, chap. 204, 11 U. S. C. A. Sec. 203), and if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Sec. 75 cannot be expected to have

> any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset. The practical administration of Sec. 75 in the lower courts already affords ample evidence of the substantial protection afforded the creditor by this requirement of good faith in the initiation of proceedings under subsections (a)-(r)."

Therefore, petitioner, John Hancock Mutual Life Insurance Company, respectfully submits that, under the facts as shown by the record in this case, the debtor, Bartels, never did submit to his creditors any feasible or acceptable plan for a composition or extension of his debts. And, under the authorities, it was incumbent upon the debtor to submit such a proposal before he was entitled to proceed under Sub-section (s) of Section 75 of the Bankruptcy Act. Having failed to meet that requirement of the Act, as said by Justice Brandeis, "the proceedings will be halted at the outset." That was precisely what the District Court did in this case by setting aside the debtor's adjudication as a bankrupt and by dismissing his petition.

There Was No Reasonable Hope of the Debtor's Rehabilitation.

The District Court, also, found that there was no reasonable hope of the debtor's rehabilitation; and, in such finding, the court said:

> "Accordingly, the court finds that there is no reasonable probability of the financial rehabilitation of this debtor." (R. 107).

The debtor, Bartels, owned the one hundred acre farm on which the petitioner, John Hancock Mutual Life Insurance Company, holds a first lien securing an indebtedness

now aggregating approximately $9,000.00; and he owned two vacant lots, purchased some twenty years ago, situated in the Mexican section of San Antonio, which lots he had never seen and for which lots he had been unable to obtain any purchase offer. He owned one horse and one milk cow. He owned a tractor which was mortgaged for $500.00 and on which a $250.00 installment payment was past due. He owned an undivided interest in a small stock of groceries of the estimated value of $250.00, which interest he had contracted to sell but has not yet sold. He had no money on hand; and he knew of no place where he could borrow any money. In addition to his lien indebtedness on the farm, he owed unsecured debts aggregating $2,100.00, and those debts were past due. His testimony showed that, over a period of several years, he had been unable to produce from the farm enough revenue to pay interest and taxes thereon, not taking into account his living expenses. (R. 16-19).

In this connection, the District Court said:

> "It is purely speculative as to what can be made on this farm, and we have no better light by which we can guide our feet than the lamp of experience. For a number of years, this farm has not paid any such fanciful returns as some of the witnesses seem to think it should; it has been shown that within the last three or four years, he has not realized more than $300.00 or $400.00 from it. Of course, it has been testified that was because he did not farm it personally; that he has been in bad health. We have no assurance here that conditions in the future will be better than in the past. Assuming that he did make $300.00 to $400.00 from the farm, it would take that much to pay the current interest without making any payments on past due interest. Then we have the matter of operating expenses, living expenses and taxes to be considered." (R. 106-107).

In the case of *Wright v. Mountain Trust Bank, supra,* Justice Brandeis said:

> "It must be assumed that the situation of the present debtor was not beyond all reasonable hope of rehabilitation, else he could not have qualified to file his petition at the outset."

Now, in this case, it was amply shown by the record of the proceedings at the first meeting of creditors before the Conciliation Commissioner, and, again, demonstrated in the full hearing before the District Court, that the debtor's financial condition generally was such that there could be no reasonable hope or expectation for his rehabilitation. Indeed, the record shows that this man's financial affairs could not be worked out; that his debts and liabilities far exceeded his assets; and that he was utterly and hopelessly insolvent. In such a situation, delay and postponement in the matter of permitting the creditor to foreclose its lien could only result in loss and detriment to the creditor, with no resulting benefit to the debtor. As well said by the District Court:

> "The debtor's situation was such that there was no reason to believe that he could be rehabilitated, and the bringing of the matter here was simply to postpone the evil day and increase the amount of his indebtedness without accomplishing any good to himself or to his creditors." (R. 99).

CONCLUSION.

Accordingly, it is the contention of petitioner that the District Court rendered the correct judgment and decree in this case, in dismissing the debtor's petition and all proceedings thereunder, and that the judgment and decision of the Circuit Court of Appeals for the Fifth Circuit, re-

versing the judgment and decree of the District Court, is erroneous for the reasons pointed out in this brief.

WHEREFORE, your petitioner respectfully prays that the decree of the United States Circuit Court of Appeals for the Fifth Circuit, whereby the judgment of the District Court in this case was reversed, be reversed by this Honorable Court; that the judgment and decree of the District Court be in all things affirmed; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

L. M. BICKETT,
San Antonio, Texas,

JOHN H. BICKETT, JR.,
Dallas, Texas,
Counsel for Petitioner.

BYRON K. ELLIOTT,
Boston, Massachusetts,
Of Counsel.

Witness the personal signature of

.....

Counsel for Petitioner, John Hancock Mutual Life Insurance Company.

The attorney of record for respondent in this cause is T. E. Mosheim, Esquire, of Seguin, Texas, to whom a copy of this brief has been furnished.

APPENDIX TO PETITIONER'S BRIEF.

APPENDIX "A".

Sub-section (s), Section 75 of the Bankruptcy Act as Amended, (Title 11, U. S. C. A., Section 203 [s]).

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided*, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel

or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interests may appear, in accordance with the provisions of this title, and may require such payments to be made quarterly, semi-annually, or annually, not inconsistent with the protection of the rights

of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a re-appraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: *Provided*, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.

(4) The conciliation commissioner, appointed under sub-section (a) of this section, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of this subsection, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such

an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under this subsection, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under this section shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this title. The provisions of this title shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

(5) This title shall be held to apply to all existing cases now pending in any Federal court, under this title, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under this title may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this title shall not be grounds for denying him the benefits of this section.

(6) This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided

for and proceed to liquidate the estate. (July 1, 1898, c. 541, Sec. 75; Mar. 3, 1933, c. 204, Sec. 1, 47 Stat. 1470; June 7, 1934, c. 424, Secs. 8, 9, 48 Stat. 925; June 28, 1934, c. 869, 48 Stat. 1289; May 15, 1935, c. 114, Sec. 3, 49 Stat. 246; Aug. 28, 1935, c. 792, Secs. 1-6, 49 Stat. 942-945).

APPENDIX "B".

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8758.

In the Matter of JOHN BEVERLY HENDERSON, *Debtor*, PETITION FOR COMPOSITION AND EXTENSION.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(December 22, 1938).

Before Hutcheson, Holmes, and McCord, Circuit Judges.

HOLMES, *Circuit Judge*:

Appellant, John Beverly Henderson, filed his petition praying that he be allowed to effect a composition or extension under the provisions of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203). At the first meeting of creditors, called by the conciliation commissioner to whom the petition was referred, he proposed a plan of conciliation and extension, but presented no acceptances from any of his creditors and obtained none at that time. No order was entered fixing the time within which a plan might be presented, and the matter lay dormant for sixty-one days, whereupon the conciliation commissioner certified the facts with a recommendation that the petition be dismissed. On the recommendation of the supervising conciliation commissioner, the court entered an order dismissing the petition, no notice of the proposed dismissal having been given to appellant. Thereafter, and within seventy-four days after the first meeting, appellant filed his amended petition for adjudication under Section 75 (S) of the Bankruptcy Act, 11 U. S.

C. A. 203 (S), and, on learning that the original petition had been dismissed, prayed that the order of dismissal be set aside and the case reinstated.

The matter was referred to the supervising conciliation commissioner, who held hearings on the petition and certified his findings of fact and conclusions of law, together with his recommendation that the petition be denied. The court thereupon denied the petition, and this appeal is prosecuted from the order dismissing the original petition and the order denying reinstatement.

No transcript of the testimony heard by the supervising conciliation commissioner is contained in the record, but it appears that his report and findings were adopted by the court. From these findings, it appears that, during the time elapsing between the first meeting of creditors and the filing of the amended petition, appellant took no steps to procure acceptances of the plan offered, except to communicate with one of the twenty creditors affected by the plan. It further appears that the plan offered proposed that, as to nineteen creditors, he be given a three-year moratorium on his debts, including the interest thereon, without subjecting either his person or his property to the jurisdiction of the court, and without applying his income to the payment of rent during the three years, proposing to pay only five per cent interest during the period, a smaller rate of interest than was allowed by law.

In denying the petition for reinstatement, the court found that no good-faith effort to effect a composition or extension had been made, and that appellant was not entitled to the relief provided for in Section 75 (S) of the Bankruptcy Act. *Baxter* v. *Savings Bank of Utica*, 92 F. (2d) 404.

Appellant challenges the action of the court on the ground that, in the absence of an order limiting the time within which he could present a plan for confirmation, he had a maximum of ninety days, under paragraph 4 of Section L of the General Orders, and that, since this time had not elapsed, the order of dismissal was prematurely entered.

It may be questioned whether or not the debtor can make this contention, since it is implied in the General Orders that such time as is allowed by the court will be on his application, and the absence of such allowance results from an absence of a request therefor; and for the further reason that he is charged with notice of the various steps taken in the proceeding, which includes the reports of the conciliation commissioner and the supervising conciliation commissioner. *Cf. Massey* v. *Farmers & Merchants Nat. Bank*, 94 F. (2d) 526.

In the present case, the finding of the court on the lack of good faith is not questioned, either in the briefs or in the record. The application to the court below for reinstatement of the petition was not that appellant be allowed to make a good-faith offer, but that he be allowed additional delay for the filing of a petition for adjudication under Section S. There is no apparent intention or desire to effect a conciliation or extension, but it appears that appellant's one purpose is to hinder and delay his creditors.

It has been pointed out that the relief afforded in subsection S is not an end in itself, but is ancillary to and in aid of the rehabilitation of distressed farmers, as contemplated under the preceding subsections of Section 75. The constitutionality of the section is grounded upon the principle that proceedings for the conciliation of creditors and the composition and extension of debts are within the scope of the bankruptcy provision of the Constitution. Such a proceeding may not be converted into a sham for the purpose of gaining whatever the petitioner wishes by way of procedural delays and hindrances to creditors, where no legitimate purpose of the act will be served. *Wright* v. *Vinton Branch*, 300 U. S. 440, 462, 57 Sup. Ct. 556, 81 L. Ed. 736; *Steverson* v. *Clark*, 86 F. (2d) 330, certiorari denied, 300 U. S. 666, 57 Sup. Ct. 508, 81 L. Ed. 874; *Knotts* v. *First Carolinas*, 86 F. (2d) 551, certiorari denied, 297 U. S. 706, 56 Sup. Ct. 498, 80 L. Ed. 994; *Baxter* v. *Savings Bank*, 92 F. (2d) 709; *Massey* v. *Farmers and Merchants*, 94 F. (2d) 526, certiorari dismissed on motion of petitioner,

303 U. S. 665, 58 Sup. Ct. 761, 82 L. Ed. 732; *Sheets* v. *Davy*, 97 F. (2d) 674; *Doak* v. *Federal Land Bank*, 99 F. (2d) 145; *Cowherd* v. *Phoenix Joint Stock Land Bank*, 99 F. (2d) 225; *Bender* v. *Federal Farm Mortgage Corp.*, 99 F. (2d) 252.

The judgment of the district court is Affirmed.

APPENDIX "C".

HUTCHESON, *Circuit Judge*, dissenting:

I dissent. Sec. 203 (s) Title 11, U. S. C. A., without exception, limitation or qualification, provides:

> "(s) Any farmer, failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition, and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt."

The majority opinion, on the authority of *Baxter* v. *Savings Bank*, 92 F. (2d) 404, denies this farmer this right.

In *Bartels* v. *John Hancock Mutual Life Insurance Company*, this day decided, the majority is disapproving the holdings in the *Baxter* case, that the right of the farmer to ask to be adjudged a bankrupt under Sec. (s) is qualified by, indeed is dependent upon, whether his proposition for a composition under preceding subdivisions is deemed to have been made in good faith.

For the reasons given in the majority opinion in the *Bartels* case, I respectfully dissent from the opinion of the majority, in this one.

APPENDIX "D".

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 8949.

HERBERT B. WILSON, Administrator of the Estate of Modena Lee Wilson, Deceased, Bankrupt, *Appellant*,

versus

ALLIANCE LIFE INSURANCE COMPANY, *Appellee*.

In Forma Pauperis.

Appeal from the District Court of the United States for the Eastern District of Texas.

(March 16, 1939).

Before Sibley, Holmes and McCord, Circuit Judges.

HOLMES, *Circuit Judge*:

This appeal is from an order setting aside a former order of adjudication in bankruptcy under Section 75 (s) of the Bankruptcy Act (11 U. S. C. A. 203 [s]) and dismissing the proceedings, because the petition was not filed in good faith and there was no hope of rehabilitation.

During her lifetime, appellant's intestate filed her petition to effect a composition or extension of her debts, and submitted her offer at the first meeting of creditors. The offer being refused, she filed her amended petition under Section 75 (s), praying to be adjudicated a bankrupt and afforded the relief therein provided. The order of adjudication was regularly entered, and proceedings for the collection of debts and enforcement of liens were stayed in accordance with the procedure prescribed in the act. Thereafter, the bankrupt died, and appellant, having qualified as administrator, petitioned to be allowed to proceed in behalf of her estate. Appellee entered its appearance in opposition to appellant's petition, alleging that the order of adjudication was improvidently entered; that no offer of composition had been made in good faith prior to adjudication; that no feasible plan of liquidation had been submitted with the offer; that there was no reasonable hope of rehabilitation; that the land upon which appellee held a lien constituted the corpus of the estate and was worth less than the amount of

the lien, leaving no equity for the estate; and prayed that the order of adjudication be set aside and the case dismissed.

On a reference to the Supervising Conciliation Commissioner, a hearing was had, after which the Commissioner found that the proposed plan of composition and extension was not made in good faith; that neither the bankrupt nor appellant had any feasible plan of rehabilitation; and that the amount of the debt to appellee was in excess of the value of the security, whereby further administration would be of no benefit to the estate. The court adopted the report of the Supervising Conciliation Commissioner, set aside the order of adjudication, and dismissed the proceeding. Relying principally upon the case of *Benno Bartels* v. *John Hancock Insurance Co.*, 100 F. (2d) 813, appellant prosecutes this appeal.

On the ground that the appeal was perfected under Section 24 (a) of the Bankruptcy Act (11 U. S. C. A. 47 [a]), whereas it should have been under Section 24 (b) (11 U. S. C. A. 47 [b]), appellee moves to dismiss the appeal. Since the record is sufficient to present questions of law which are determinative of the controversy, the motion to dismiss will be overruled, and the appeal will be allowed as if brought under Section 24 (b) for the consideration of the questions of law only. *Baxter* v. *Savings Bank of Utica*, 92 F. (2) 404, 405, and cases cited.

Accepting the finding that the offer was not made in good faith and that there is no reasonable hope of rehabilitation, as we must on this appeal, appellant's contention is reduced to the proposition that the district court was without authority to set aside the adjudication and dismiss the proceeding, but was bound to continue the stay provided for or to liquidate according to the procedure and subject to the limitations provided for in the act. Following what we conceive to be the correct interpretation of the case of *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. U. 440, 57 Sup. Ct. 556, 81 L. Ed. 736, we have held that good faith and a reasonable hope of rehabilitation in the proceedings leading to, as well as in making, the offer of

composition and extension under Section 75 of the Act (11 U. S. C. A. 203 [a]-[r]) are necessary prerequisites to the benefits provided under subsection (s) (11 U. S. C. A. 203 [s]). *Baxter* v. *Savings Bank of Utica, supra*, 92 F. (2), 404, 406; *In re John Beverly Henderson*, 100 F. (2) 820.

As to the contention that the authority to dismiss does not exist in the district court, because not expressly conferred by the act, it should be noted that the general bankruptcy act contains no provision authorizing a dismissal for fraud or lack of jurisdiction. It is true that the bankruptcy court is limited in its jurisdiction, being created by statute; but, even so, it is a court of equity, within its sphere, and may protect itself from being used as an instrument of hindering and delaying creditors when the debtor, in filing the petition, was acting in bad faith and without hope of rehabilitation. To let the adjudication stand in such circumstances would be to sanction the continuation of an unwarranted imposition upon the jurisdiction of the court.

Furthermore, the petition to be adjudged a bankrupt under 75 (s) is merely an amendment to the prayer of the petition for a composition and extension under 75 (a)-(r), as to which there is express statutory authority to dismiss because not filed in good faith. The argument of appellant is reduced to this: that, although there is statutory authority to dismiss the original petition for lack of good faith, this authority is lost when the prayer of the petition is amended by asking to be adjudged a bankrupt, even though the prayer is amended under a separate paragraph of the same act.

Added to the principle that the law will not do an idle thing, we have, then, to support the action of the court in dismissing the petition and amendment thereto: 1, the inherent power of a court of bankruptcy to protect its jurisdiction from abuse; 2, the express statutory power to dismiss the original petition under Section 75 (a)-(r) for lack of good faith, the prayer only of the petition being amended under paragraph (s); 3, the construction of the act by the supreme court in *Wright* v. *Vinton Branch, supra*, upholding its constitutionality on the ground that the bankruptcy

court has the power to put an end to the proceedings, if not filed in good faith; 4, the opinion of Mr. Justice Brandeis, that relief under 75 (s) may be obtained only by one who has made a bona fide attempt, and has failed, to effect a composition under Section 75 (a)-(r), followed by his statement that "if the debtor is beyond all reasonable hope of financial rehabilitation, and the proceedings under Section 75 cannot be expected to have any effect beyond postponing inevitable liquidation, the proceedings will be halted at the outset." 300 U. S. 462. If further implication of power is needed, it is found in 75 (i), which provides that the court shall confirm the proposal if satisfied that the offer and its acceptance are in good faith.

The judgment of the district court is Affirmed.

APPENDIX "E".

SIBLEY, *Circuit Judge*, concurring:

In the case of John Beverly Henderson, 100 F. (2d) 820, the farmer-debtor under Sect. 75 of the Bankruptcy Act had not been adjudicated a bankrupt. In the case of Benno Bartels, 100 F. (2d) 813, he had been adjudicated. The present case falls directly under the latter decision, for Modena Wilson had been adjudged a bankrupt for about two years when the secured creditor on motion got a revocation of the adjudication and a dismissal of the proceedings. I persist in thinking the exposition of the law in the Benno Bartels case to be correct. Section 74 and Section 75 are not to be construed together as composite legislation. Each is a separate scheme to be distinguished from the other. In Section 74 any person not a corporation, whether in or out of bankruptcy, may petition in good faith and obtain the provided relief. Subsection (1) provides for an adjudication in bankruptcy of the debtor if the proceeding was commenced or prolonged for the purpose of delaying creditors or delaying an adjudication, or if confirmation of his proposal is denied, except that in the case of a farmer he must consent to adjudication. Section 75 sets up a more

elaborate organization, including conciliation commissioners, and it applies only to farmers. It contains several provisions which are repetitions of what was enacted in Section 74, but this only shows that the two are independent of one another and one includes nothing merely because it is in the other. Under Section 75 the farmer-debtor who fails to obtain the consent of his creditors to his plan of extension is not liquidated as of course, as the debtor under Section 74 (1) is, but Subsection (s) permits him without any conditions whatever to amend his petition and ask to be adjudged a bankrupt. When that is done he is a voluntary bankrupt, and comes under the general bankruptcy law, except as Subsection (s) has modified it. The main modification is that instead of surrendering all his property at once he may on request keep it upon terms fixed and supervised by the court for three years, with a view of rehabilitating the farmer as such. He is still a bankrupt during the effort at rehabilitation. If he fails to keep the terms or it appears that he will not be able to refinance himself in three years, or if rehabilitation fails because secured creditors pursuing their rights take the farm away, the rehabilitation of course fails, but the farmer is still in voluntary bankruptcy. A secured creditor cannot dismiss the proceeding on motion or set aside the adjudication. His right is, on sufficient grounds, to have his security abandoned to him if there is no equity for the estate, or to have the court sell it for him, or permit him to foreclose. The farmer and his other creditors are entitled to go ahead in bankruptcy on this adjudication, and the bankruptcy case can be dismissed only after notice to creditors. As in the Benno Bartels case, so in this, the secured creditor, while he might have asked a release or a sale of his security by the court for the reasons he urged, had no standing to have the adjudication set aside and the case dismissed.

Nevertheless, in the circumstances here disclosed, this erroneous action did no one any harm. The secured creditor gets opportunity to foreclose on his security. There is no equity in it and no other estate, and no possible benefit to the slight unsecured indebtedness in continuing the bank-

ruptcy. The debtor herself was dead and a discharge would do her no good. While the regular course would have been to abandon the farm to the secured creditor, and to close the estate without a trustee because there are no assets, the course taken accomplishes the same thing. Because no injury was done anyone I concur in affirming the judgment.